

## **SINGH (Migration) [2019] AATA 1187 (19 February 2019)**

### **DECISION RECORD**

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|---------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>DIVISION:</b>          | Migration & Refugee Division                                                                                                                                                                                                                                                                                                                                   |
| <b>APPLICANT:</b>         | Mr Anoop SINGH                                                                                                                                                                                                                                                                                                                                                 |
| <b>CASE NUMBER:</b>       | 1708144                                                                                                                                                                                                                                                                                                                                                        |
| <b>DIBP REFERENCE(S):</b> | BCC2015/2318796                                                                                                                                                                                                                                                                                                                                                |
| <b>MEMBER:</b>            | Russell Matheson                                                                                                                                                                                                                                                                                                                                               |
| <b>DATE:</b>              | 19 February 2019                                                                                                                                                                                                                                                                                                                                               |
| <b>PLACE OF DECISION:</b> | Sydney                                                                                                                                                                                                                                                                                                                                                         |
| <b>DECISION:</b>          | <p>The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:</p> <ul style="list-style-type: none"><li>• cl.820.211(2) of Schedule 2 to the Regulations; and</li><li>• cl.820.221(1)(a) of Schedule 2 to the Regulations.</li></ul> |

Statement made on 19 February 2019 at 8:25am

### **CATCHWORDS**

*MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – lived together and established a joint household – socially recognised by family and friends – married for four years – decision under review remitted*

1.

### **LEGISLATION**

*Migration Act 1958 (Cth), ss 5F, 65*

*Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.211, 820.221*

### **CASES**

*He v MIBP [2017] FCAFC 206*

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

2. This is an application for review of a decision of a delegate of the Minister for Immigration on 29 March 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant is a 23 year old male national of India. He applied for the visa on 12 August 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant was the spouse of the sponsor. The applicant seeks review of the delegate's decision.
5. The applicant appeared before the Tribunal on 23 October 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Hindi and English languages.
6. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

### CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
9. The Tribunal has before it the applicant's file from the Department of Immigration (the Department); its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
10. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

#### **Whether the parties are in a spouse or de facto relationship**

11. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
12. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together,

or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

### **Are the parties validly married?**

13. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered under the *Marriage Act 1961* indicating the applicant and sponsor were married on 10 July 2015 at the Registry of Births, Deaths and Marriages, Parramatta, NSW. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
14. In forming an opinion as to whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has had regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3).
15. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
16. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence at the hearing and found their evidence to be detailed, consistent and overall, credible. The applicant and sponsor provided a number of minor inconsistencies in evidence during the hearing these were adequately explained orally and in a written submission. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and evidence provided by the applicant to the Department as well as the Tribunal file due regard. The applicant provided a significant amount of additional documentary and photographic evidence to the Tribunal.
17. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the parties were credible witnesses.

### **Are the other requirements for a spouse relationship met?**

#### **18. Financial aspects**

19. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of daily household expenses.
20. The parties provided evidence that they have their own personal accounts and an ANZ joint account that they utilise for their day-to-day living expenses and payment of bills and rent.

The parties stated that they previously had a joint account with Westpac they no longer use. The sponsor stated that when she was working her wages were deposited into her personal account and she would withdraw cash and give it to the applicant to deposit into the joint account for the day-to-day living expenses and rent. The Tribunal accepts that there have been cash deposits made into the joint accounts but is unable to determine who made the deposits or for what purpose. The Tribunal places little weight on this as evidence of the sponsor making a contribution to the joint account or pooling or sharing of financial resources. The applicant gave evidence that the sponsor is no longer working and that he manages the couple's finances paying the rent, utility bills, telephone and internet bills and all other household bills and other expenses associated with the sponsor's child from a previous relationship.

21. The parties had a sound knowledge and presented detailed and consistent evidence of their financial affairs, including income, bank accounts, daily living expenses, payment of utility bills and employment.
22. The parties gave detailed and consistent evidence in relation to the financial aspects of the relationship. The parties' evidence is that they have no joint liabilities and no major assets such as property together. There is limited evidence before the Tribunal of pooling or sharing of financial resources or any ongoing financial obligations. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. The Tribunal accepts that the parties are prepared to share their financial resources and any ongoing or future financial responsibilities. The Tribunal places moderate weight on this aspect of the relationship.

**23. *Nature of the household***

24. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, the living arrangements and daily routine of the parties and the sharing of the responsibility for housework, to form an opinion as to whether the parties are living together and not living separately and apart on a permanent basis.
25. The applicant has previously provided a tenancy agreement and rental receipts in joint names for [an address in] Punchbowl for the period April to October 2016 to the Department. The parties provided a number of additional documents in joint and in individual names for their current address [in] Bankstown. They also provided evidence of sharing the household duties and responsibilities, such as household chores, preparing and cooking meals and caring for the sponsor's child from a previous relationship.
26. The couple gave detailed and consistent evidence about their living arrangements at their current residential address and previous residential addresses. They provided detailed and consistent evidence of their personal history, living arrangements and household responsibilities and the care and support for the sponsor's child from a previous relationship. The applicant provided detailed knowledge in regard to the sponsor's child. The parties stated that they had notified government agencies that they were in a spousal relationship.
27. The Tribunal accepts that the parties live together and they have established a joint household and share the responsibility of the housework. The Tribunal accepts the applicant and sponsor provide care and support to the sponsor's daughter.

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**30. *Social aspects***

31. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinions of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
32. The applicant provided a significant amount of additional documentary and photographic evidence at the hearing to the Tribunal. The applicant provided photos of himself and the sponsor with each other, and with friends and family in a number of social settings and at various events. The Tribunal found the photographic evidence persuasive. The Tribunal finds that the relationship between the applicant and sponsor is recognised and supported by the sponsor's family and the parties' friends.
33. The Tribunal accepts that the relationship is socially recognised by family and friends and they represent themselves to other people as being married to each other. The Tribunal accepts that the parties plan and undertake joint social activities together. There are statements from third parties, including close family members, who express their view that the relationship is a genuine one. The Tribunal places considerable weight on the social aspects of the relationship.

**34. Commitment**

35. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other and whether the parties view the relationship as a long-term one.
36. The parties claim to have known each other since December 2014 and their relationship developed over the ensuing months. The applicant stated that he was working with the sponsor's mother at Sydney Hotel and she was his supervisor and she introduced the couple to each other. The applicant and sponsor were married on 10 July 2015 at the Registry of Births, Deaths and Marriages, Parramatta, NSW. The parties provided a copy of their marriage certificate and the Tribunal accepts that they are lawfully married. To date, the relationship has been in existence for a period of time exceeding four years.
37. The applicant and sponsor provided detailed and consistent evidence of their life together including living with and providing care and support for the sponsor's daughter. The parties provided persuasive oral evidence of their future plans together and the Tribunal found them to be genuine. The parties provided evidence of their love, mutual care and understanding and support of each other during times of sickness, health and family grief. The Tribunal is satisfied the parties see their relationship as stable, mutually supportive and long-term.
38. The applicant and sponsor provided detailed and consistent evidence of the parties' life together and as a family and their future plans together and their belief that they are in a long-term relationship. The parties provided persuasive oral and documentary evidence of being in a genuine and continuing relationship.
39. The Tribunal is satisfied the applicant and the sponsor provide each other with a strong degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.
40. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests and expectations. The Tribunal is satisfied the parties provide each other with a strong degree of

companionship and emotional support that is commensurate with a couple being in a genuine spousal relationship.

**41. Findings**

42. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided at the hearing, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together and not separately and apart on a permanent basis. Having considered all the evidence and circumstances of the relationship as detailed above, the Tribunal is satisfied the parties were in a spousal relationship at the time of application.
43. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision, was an Australian citizen who had turned 18.
44. The applicant's movement records provide evidence of him having been the holder of a Student (Subclass 573) visa at the time of application that was valid until 16 August 2016. He held this substantive visa upon applying for the Partner (Temporary) (Class UK) Subclass 820 visa on 12 August 2015. As the applicant held a substantive visa at the time of application, further requirements in cl.820.211(2)(d) need not be met.
45. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2)(b)-(d) of the Act were met at the time the visa application was made and are met at the time of this decision.
46. Therefore the applicant meets cl.820.211(2) and cl.820.221(1)(a).
47. Given the findings above, the appropriate course is to remit the visa application to the Minister to consider the remaining criteria for a Subclass 820 visa.

**48. DECISION**

49. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
  - cl.820.211(2) of Schedule 2 to the Regulations; and
  - cl.820.221(1)(a) of Schedule 2 to the Regulations.

Russell Matheson  
Member

## **ATTACHMENT - Extract from Migration Regulations 1994**

### **1.15A Spouse**

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).